82-181

Office - Supreme Court, U.S.
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ALEXANDER L. STEVAS,
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ARCHIE PELTZMAN,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
UNITED STATES OF AMERICA

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

ARCHIE PELTZMAN
Petitioner, Pro Se,
2483 W. 16th St.
Brooklyn, N.Y. 11214

QUESTIONS PRESENTED

1. Whether the Court of Appeals decision granting a motion for summary affirmance by the Federal Maritime Commission, without submission of a brief by the Commission, or oral argument, and by a two Judge panel, one Judge not participating, violated petitioner's procedural rights under the Administrative Procedure Act, the Federal Rules of Appellate Procedure, and was arbitrary, capricious, an abuse of discretion, and not in accordance with the law as interpreted by this Court's decision in Federal Maritime Commission V. Pacific Maritime Association, 435 US 40, 1978?

2. Whether the Federal Maritime Commission has jurisdiction to investigate a sworn complaint that statutory rights and constitutional rights of seamen applicants for employment have been violated by an illegal pre-hire exclusive preferential hiring-hall referral bargaining agreement in the maritime industry which negate those rights?

QUESTIONS PRESENTED

3. Whether an exclusive, preferential, or cooperative working arrangement in a bargaining agreement, violates the public policy of the Shipping Act 1916 as amended, and is a per se violation of Title Vl of the Civil Rights Act of 1964, which prohibits discrimination in employment on subsidized United States Merchant Marine vessels?

Parties to The Proceeding In The Court Of Appeals Are:

Federal Maritime Commission

United States of America

Intervenors Are:

Maritime Service Committee, et al.,

Central Gulf Lines,

American Maritime Association,

Pacific Maritime Association,

National Maritime Union of America.

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

No. _____

ARCHIE PELTZMAN,

Petitioner,

v.

FEDERAL MARITIME COMMISSION
AND UNITED STATES OF AMERICA,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petitioner, Archie Peltzman, pro se, petitions for a writ of certiorari to review the decision of the United States Court of Appeals for the District of Columbia Circuit, and to review the decision of the Federal Maritime Commission.

OPINIONS BELOW

The per curiam order of the Court of Appeals granting the Federal Maritime Commission (FMC) motion for summary affirmance *(App A, p. 1a-2a), the order denying rehearing (App B, p. 3a), the order denying rehearing en banc (App c, p. 4a), are attached. Petitioner has no knowledge whether these orders have been reported.

The decision of the Administrative Law Judge (ALJ) dismissing petitioner's complaint (App D, p. 5a-22a), The Commission's order adopting (ALJ's) dismissal of complaint as modified and clarified in its opinion (App E, p. 23a-35a) are attached. The (ALJ's) order of dismissal appears in Shipping Regulation Reports at 20 SRR 939; The Commission's order of adoption appears at 20 SRR 1479. The decisions have not yet appeared in the (FMC's) bound volumes.

*App. A,B,C,D,E are references to attached Court orders, and Federal Maritime Commission decisions in the petition.

JURISDICTION

The decision of the Court of Appeals was rendered on March 29, 1982. A timely petition for rehearing and rehearing en-banc was filed on April 19, 1982. This was denied on May 19, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1), within 90 days of that date.

STATUTORY PROVISIONS INVOLVED

1. Sec. 15, Shipping Act, 1916, 39 Stat 728, as amended 46 U.S.C. 801 et seq. Relevant portion attached, (App F. 36a).

2. Title VI of the Civil Rights Act of 1964, (P.L. 88-3521).

3. Sherman Anti-Trust Act Sec 1 et seq.

STATEMENT OF THE CASE

A. Complaint allegations:

1. Petitioner Archie Peltzman, a merchant seaman radio officer filed a sworn complaint *(JA 6-21) before the Federal Maritime

*JA refers to Joint Appendix in the Court of Appeals.

Commission (FMC) on July 29, 1980 alleging violations of the Shipping Act 1916 against Pacific Maritime Association (PMA), American Maritime Association (AMA), independent shipping companies and various seamen unions (JA 14-21) lists the companies and unions.

2. In essence petitioner alleged that the multi-employer bargaining agreements violated the Shipping Act because the exclusive preferential hiring hall clause restricts access to seamen jobs to union members only, and in effect was a "closed shop" pre-hire agreement, illegal under the Taft-Hartley Act, and the Shipping Act. (JA 10,11,12).

3. Petitioner also alleged(JA 8) that the two seamen's unions representing Marine Radio Officers, American Radio Association (ARA), and Radio Officers Union (ROU) represented over ninety percent of the seamen in the industry, thereby controlling the entrance and tenure of employment in the trade by the restrictive "closed shop" agreements.

4. Petitioner alleged that the *Maritime Administration had made subsidy payments to various subsidized shipping companies, and the unions who had been unjustly enriched to the detriment of petitioner, and other seamen similarly situated in violation of the Shipping Act. (JA 12).

B. Administrative Law Judge decision dismissing petitioner's complaint:

1. "The complaint of Mr. Archie Peltzman fails to state a cause of action upon which relief can be granted and is time barred. The complaint is dismissed". (App 22a)

2. In an eighteen page decision the A.L.J. decided that the Commission had no jurisdiction over labor related agreements

*In petitioner's Brief in the Court of Appeals is the argument that Title VI of the Civil Rights Act of 1964 forbids discrimination in employment by subsidized shipping companies. (p. 7)

which establish membership as a condition precedent to employment as a Radio Officer in the industry. (App 15a)

3. The "labor exemption" criteria in United Stevedoring Corp. v. Boston Shipping Assoc. 16 F.M.C. 7, 1972 is cited as a solution to this Court's decision in Volkswagenwerk Aktiengesellschaft v. Marine Terminals, 9 F.M.C. 77 relating to the Commissions problem of "reconciling or accomodating shipping act policies with labor act policies." (App 17a)

4. The A.L.J. says "application of these criteria to the agreements Mr. Peltzman says violate the Shipping Act clearly demonstrates that the agreements come under the labor exemption, and thus are immune from the challenge under the Shipping Act". (App. 18a).

C. Federal Maritime Commission's Order Adopting Dismissal of Complaint :

1. The Commission adopted the A.L.J.'s dismissal of complaint with two exceptions. First was that Sec 16 does reach actions that are "labor exempt," and secondly that the two year statute of limitations only applies to claims for reparations, and does not act as a bar to requests for other relief. But the Commission said "this fact is not significant here because complainant has not otherwise stated a claim upon which relief can be granted." (App 34a)

2. The authority cited for the exception to the A.L.J's decision is Federal Maritime Commission v. Pacific Maritime Ass'n 435 U.S. 40, 1978. (app 34a)

3. The Commission refers to petitioner's complaint of exclusive pre-hire hiring-hall arrangements; and says

"Complainant's grievance therefore addresses pure employer-employee union matters which are not cognizable under the Shipping Act. n 8. (Such matters appear to fall within the province of the National Labor Relations Act). See New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F2d 1215, (2d Cir.) Cert den. 419 U.S. 964, (1974). cf FMC v. PMA, 435 U.S. 40, 1978. n 9. (In PMA, the Supreme Court recognized that collective bargaining agreements could be subject to Section 15 of the Shipping Act and found such an agreement so subject when it imposed terms relating to employer competitition in providing transportation related services upon employers not members of a multi-employer bargaining unit"). (App 31a)

D. Decision of Court of Appeals Granting Summary Affirmance Motion by the Federal Maritime Commission Dismissing Petitioner's Complaint:

1. The Court of Appeals, in a per curiam order, one judge not participating, granted summary affirmance of the Commission's decision, but overuled the Commission on the interpretation of Sec 16, & 17, of the Act, in effect upholding the decision of the Administrative Law Judge. (App 1-2a).

2. Petitioner filed his brief on 11-30-81 three days after the Commission's motion for summary affirmance. On 12-02-81 the Commission filed a motion to suspend briefing pending ruling on their motion for summary affirmance. On that same day petitioner filed the Joint appendix. On 12-16-81 the Court granted FMC's motion to suspend briefing, and time for filing respondents brief pending Courts disposition of the motion for summary affirmance.

REASONS FOR GRANTING THE WRIT

1. The decision affects employment access, and tenure in the entire maritime industry operating under an illegal pre-hire, closed shop, exclusive hiring-hall referral bargaining agreement violative of the Shipping Act 1916 as amended.

a. See 84 West Va. L.R. 31, 1979. "Application Of A Constitutionally Based Duty of Fair Representation to Union Hiring Halls."

REASONS FOR GRANTING THE WRIT

Pages 45-52 contains methods of hiring hall operations and its history. Hiring hall abuses are on p 52-62. On p 55 is cited n 125 United States Civil Rights Commission Report on discriminatory practices by referral unions, 1976, reprinted in A. Smith, "Employment Discrimination Law," 844, 1978.

b. Pre-hire cases are cited in petitioner's brief in the Court of Appeals, p 17-18. Longshoremen v. Marine Engineers, S/S Ultramar, & S/S Ultrasea, 65 Labor Arbitration cases 130,January 2, 1975. Longshoremen v. Marine Engineers, S/S Notre Dame Victory, 65 Labor Arbitration cases 136, January 2, 1975. In the S/S Ultramar & S/S Ultrases cases built with subsidy construction funds, the two officer's unions Masters Mates and Pilots, and National Marine Engineers Beneficial Association complained to the AFL-CIO arbitrator that each had legitimate

reasons to man the new ships.

The arbitrator said MEBA did not violate Sec 20 (of AFL-CIO Constitution.) He said:

> It is wall recognized by now that both affilliates and ship owners, who have been in business for years, make their arrangements to man their licensed officers prior to the actual operations or launching of the vessels involved.

Petitioner argues that Title VI of the Civil Rights Act of 1964, prohibiting employment discrimination in subsidized shipping companies having contracts with the Dep't. of Commerce was violated by these pre-hire agreements, illegal under the National Labor Relations Act,presidential executive orders, and Equal Employment Opportunity Act since non-union graduates of Government subsidized academy schools had no opportunity to apply for these positions.

c. In the C/S Notre Dame Victory case, the arbitrator found for MEBA, and said pre-

hire agreements for non-supervisory employees should get Art. 20 (AFL-CIO Constitution) protection and cites ILA-SIU & MM&P Tugboat Inc., 65 LA 63 case no 74-34, January 2, 1975.

11. The decision affects basic fundamental human rights guaranteed by statutory, constitutional, and international treaties which are violated by the multi-employer agreements complained of in the sworn complaint to the Federal Maritime Commission.

a. Twenty states have Right to Work laws which ban compulsory unionism.

The first amendment to the U.S. Constitution protects freedom to join or refraiming from joining a union or association, See Art. 20 of United Nations "Universal Declaration of Human Rights."

1. Everyone has the right to freedom of peaceful assembly and association.

2. No one may be compelled to belong to an association.

b. Petitioner cited in his petition for rehearing in banc (p 9) the case of Young, James and Webster v. United Kingdom, 4 E.H.R.R. (Europeam Human Rights Reports) decided June 26, 1981 - held eighteen votes to three that there had been a breach of Art. 11 of the convention. The case concerned a union closed shop agreement - dismissal of existing employees - freedom of association - liability of the state.

Five judges in a concurring opinion said:

> The mere fact of being obliged to give the reasons for one's refusal to join an association constitutes a violation of the freedom of association.

(Concurring opinion p 59 infra.)

The goverment conceded that, should the dismissal of the applicants constitute an interference with their right of freedomof association under Article 11 of the Convention which was attributable to domestic legislation, The United Kingdon

would be responsible by reason of having enacted such legislation. (p 38)

111. The decision by the Court of Appeals and the Federal Maritime Commission, have both departed from the accepted and usual course of judicial and administrative procedural guarantees as to call for exercise of this Courts power of supervision.

1. A summary affirmance motion by the Commission to dismiss petitioner's complaint and the dismissal by a two Judge panel without an oral hearing or briefs from the Commission was a violation of theCourts own rules, and the Federal Rules of Appellate Procedure.

2. Petitioner argued in his petition for rehearing in banc that Rule 11 of the Court prohibited disposition of the appeal, without oral hearing, and that a determination by a three judge panel must be unanimous if the appeal is frivolous and (a)

REASONS FOR GRANTING THE WRIT

Dispositive issues or set of issues has been recently authoritavely decided, and (b) facts and legal arguments are adequately presented in briefs and records, and oral argument would not significantly aid the Court.

3. Petitioner argued that his appeal could not be regarded as frivolous since it involves fundamental constitutional issues of basic human rights of access to employment that effect employment in the entire United States Merchant Marine.

4. In this Court petitioner argues that Kempf v. Estelle, 606 F2d 518 (CA 5, 1979) holds that a "Motion to dismiss Appeal" which did not address any procedural deficiency in the appeal but rather addressed the merits of the appellant's claim, would be denied. The merits of an appeal are to be presented to the Courts by briefs filed in accordance with the provisions of App-

ellate Rule 28, not by motion under Appellate Rule 27.

5. A recent decision by this Court docket nr 80-6845, Boag v. MacDougall, 50 LW 3539, January 12, 1982, holding that on the basis of the record before us, "We cannot find a sufficient ground for affirming the dismissal of the complaint." That case concerned a prisoner's pro se's complaint and this Court said that it should be construed liberally.

Petitioner argues that his complaint and pleadings before the Commission was not investigated, and relevant pleadings, and his brief in Court of Appeals was also not judicially noted. This Court by reading the order of the Court could not tell even if the Court had seen the record in the Commission. (App 1a)

6. Petitioner argues that in his petition for reconsideration addressed to the Admin-

istrative Law Judge, dated March 30, 1981 (JA 103-112) which the Commission treated as an appeal, and in various other pleadings on December 5, 1980, (JA 73-78), January20, 1981 (JA 81-84), petitioner argued (Dec. 5) that the responsibility of the Commission was to protect the public interest which may be adversely affected by all forms of anti-competitive agreements.

Petitioner argued (Jan. 20) that a report to the President by the Maritime Labor Board from July 8,1938 to June 30, 1941 contained a table showing under the heading of "closed shop" 10 cases involving 8,519 workers, Under preferential hiring there were 10 cases involving 25,815 employees.

Petitioner in his complaint (JA 12), contended that these "closed shop" violations were violative of the public policy of the Shipping Act, and the Norris Laquardia Act.

REASONS FOR GRANTING THE WRIT

7. The Administrative Law Judge (ALJ) said in his decision (App 19), that "closed shop" or union security clauses are proper union concerns and are primarily, and commonly associated with a bona fide labor purpose."

The Commission did not correct this (ALJ) reference to "closed shop" bona fide labor purpose, and did not mention in its decision the January 20, 1981 pleading (JA 81-84) of the Maritime Labor Board's report to the President re "closed shops,"(1938 to 1941).

8. Petitioner argues that the Court of Appeals per curiam order (App 1a), dismissed the complaint without discussing any pleadings in the case, or the reasons for the decision except for a citation of one case, United Stevedoring Corp. v. Boston Shipping Assn, 16 F.M.C., 1972.

This in effect was a refusal by the Court to adhere to the leading decisions of this Court, Federal Maritime Commission v. Pacific Maritime Association, 435 U.S. 40, 1978. Volkswagenwerk Aktsengesellschaft v. F.M.C., 390 U.S. 261, 1968, and F.M.C. v. Aktiebolaget Svenska Amerika Linen (Swedish Am. Line), 390 U.S. 238, 1971, which are dispositive of the questions as to the jurisdiction of the F.M.C. in the Shipping Act, 1916 as amended regarding filing of agreements before the Commission. i.e. agreements that are anti-competive, detrimental to the Commerce of the United States and violative of the Public Policy of the Act.

9. Finally, petitioner argues that the illegal agreements complained of have been the reason for the decline of the Merchant Marine, and shortage of seamen in time of need for defense, and has added to the sub-

sidy costs of the government by inflated manning scales, and other restrictive practices in the agreements. See Federal Maritime Commissioner Leslie Kanuk's *speech before the port of Baltimore Propeller Club. Dr. Kanuk criticized "each institutional segment" of the Maritime community for its "selfcenteredness, its lack of vision, and its refusal to compromise for the broader good, for the public good."

Commissioner Kanuk cited Rep. Paul N. McCloskey (R-Calif.) remarks regarding manning levels in the Merchant Marine, "Mr. McCloskey often cites the fact that when Pacific Far East Line went bankrupt, it was operating ships with 40-man crews, while

*Reported in the maritime trade periodical American Shipper, July 1, 1980, p 38.

REASONS FOR GRANTING THE WRIT

Delta Steamship Lines operated the same (type) ships with 32-man crews. Of course the Coast Guard safety standard for the same ship was 22 men. With no check on manning scales under ODS, the cost of any inflated scales would be borne not by management, but by the American public."

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

Archie Peltzman

Dated: July 18,1982 Archie Peltzman, pro se

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2026 September Term, 1981

ARCHIE PELTZMAN,
Petitioner

v.

Federal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE:
Tamm*, Ginsburg and Bork, Circuit Judges

ORDER

Upon consideration of respondent's motion for summary affirmance, and of the responses thereto, it is

Ordered by the Court that the motion for summary affirmance is granted. The Federal Maritime Commission has no jurisdiction under section 15 of the Shipping

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*Circuit Judge Tamm did not participate in this order.

Act, 46, U.S.C. Sec. 814, over the union security clause in collective bargaining agreements, as such clauses fall within the nonstatutory labor exemption to section 15 jurisdiction. See United Stevedore Corp. v. Boston Shipping Ass'n., 16 FMC 7 (1962). Petitioner's complaint further failed to state a cause of action under sections 16 and 17 of the Shipping Act, 46 U.S.C. sections 816 and 816.

Per Curiam

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit

FILED MAR.29, 1982

GEORGE A. FISHER
CLERK

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

o. 81-2026 September Term, 1981

rchie Peltzman,
Petitioner

v.

'ederal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE: Ginsburg and Bork, Circuit Judges

ORDER

On consideration of petitioner's petition for rehearing, filed April 19, 1982, it is

ORDERED by the Court that the aforesaid petition is denied.

Per Curiam

Filed:

May 19, 1982

FOR THE COURT:

GEORGE A. FISHER,
Clerk

BY: S/Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2026 September Term, 1981

Archie Peltzman,
Petitioner

v.

Federal Maritime Commission,
Respondent

Maritime Service Committee, et al.,
Central Gulf Lines,
Pacific Maritime Association,
American Maritime Association,
National Maritime Union of America,
Intervenors

BEFORE: Robinson, Chief Judge, Wright, Tamm, MacKinnon, Robb, Wilkey, Wald, Mikva, Edwards, Ginsburg and Bork, Circuit Judges

ORDER

Petitioner's suggestion for rehearing en banc has been circulated to the full Court and no member of the Court has requested the taking of a vote thereon. On consideration of the foregoing, it is

ORDERED by the Court en banc that the aforesaid suggestion is denied.

Per Curiam
FOR THE COURT:
George A. Fisher, clerk
BY: S/Robert A. Bonner
Robert A. Bonner
Chief Deputy Clerk

Filed:
May 19, 1982

(S E R V E D)
(MARCH 13, 1981)
(FEDERAL MARITIME COMMISSION)

FEDERAL MARITIME COMMISSION

WASHINGTON, D. C.

March 10, 1981

NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

DISMISSAL OF COMPLAINT

Complainant, Archie Peltzman, a "Marine Radio Officer," charges some 185 entities with depriving him of employment on certain vessels through "monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Association." Some of the respondents are named in the body of the complaint while the remainder are designated in four appendices to the complaint. Those named in the complaint appear to be the principal respondents and they are:

The American Maritime Association (AMA) and the Pacific Maritime Association (PMA) which are "the employers collective bargaining representatives,

negotiating on behalf of the employers with the American Radio Association, and the Radio Officers Union and with other seamen's unions in the maritime industry for wages, pensions, and other benefits to be paid seamen employed on the vessels listed in Annex A, B, C" to the complaint.

The American Radio Association (ARA) and the Radio Officers Union (ROU) are both unions, which together represent "over ninety percent of the Marine Radio Officers in the maritime industry thereby controlling the entrance and continuity of employment in the trade by the restrictive hiring hall agreements negotiated with AMA and PMA." According to Mr. Peltzman, all "Radio Officers are hired through union hiring halls and continuity of employment is controlled by the restrictive 'closed shop' agreements with AMA and PMA."

The "American Federation of Labor-CIO (AFL-CIO) which is an association which has unions in the maritime field. . . ."

The remaining respondents are according to Mr. Peltzman "common carriers by water" subject to the Shipping Act "which have bargaining agreements with the unions and associations already named or with others named in appendix D to the complaint."

Mr. Peltzman states that the case "arises under section 15 of the Shipping Act, 1916, as amended" and recites the events leading up to the filing of the complaint as follows: 1/

"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU and did not file the agreements

---

1/ The numbers preceding the paragraphs in the complaint have been omitted. No other editorial changes have been made.

negotiated with the other maritime unions affiliated with the American Federation of Labor-CIO.

"In 1978 PMA filed an agreement with ARA which the Commission on August 18, 1978, granted a temporary exemption, which the complainant by telegram on November 30, 1978, and later by a letter giving reasons for such protest. PMA sought either approval pursuant to section 15 of the Act or exemption therefrom.

"AMA and PMA control and determine the amount to be assessed to each shipping company for the various funds of the unions, for the benefit of the individual shipping company employees as provided under the collective bargaining agreement with the unions in the maritime industry.

"Pursuant to the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices and tenure of employment for 'union members' only, the complainant and other seamen similarly situated have been subjected to prejudice and disadvantage in violation of Section 16 of the Act, (B) constituted unjust and unreasonable regulations and practices in violation of section 17 of the Act, and (C) cause the agreement to be unjustly discriminatory and unfair as between 'members' of the unions and 'permit card members,' all to the detriment of the commerce of the United States, and to be contrary to the public interest in violation of section 15 of the Act, and to the public policy of the Government as expressed in the Taft-Hartley Act, Landrum-Griffin Act, and the Norris Laguardia Act. Similarly the statutes enacted for the protection of seamen in Title 46 have been nullified by the bargaining agreement.

"This complaint is not directed to the amounts of wages or benefits which are agreed to be paid seamen under the agreement. This complaint is

directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall agreements, and 'union' membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to 'join' a union or be discharged from employment if they do not 'join' a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed shop agreement, requiring membership as a condition of employment or referral by a union as a condition of employment.

"AMA and PMA are controlled by the shipping companies listed in Annex A, B, C. When raises and other benefits are negotiated the Maritime Administration pays the shipping companies a subsidy to cover these raises in pay and other benefits. This is done by the Government in order to strengthen and keep the Merchant Marine ready for any emergency, and to provide this country with commercial carriers to compete in world trade with foreign vessels, and to have a sufficient supply of seamen to man those vessels.

"AMA and PMA and some independent shipping companies have caused the seamen who are not 'union' members to be deprived of the benefits negotiated on their behalf, and thereby treated those seamen discriminatorily by discharging 'non-union' employees, and offering only temporary employment to 'non-union' employees.

"Seamen employed by the bargaining agreement are employed on an industry wide basis, and the benefits of the agreement in respect to entry in the trade, continuity of employment, health welfare, vacation, and pension benefits are restricted to 'union members' to the detriment of the complainant and those similarly situated who are not 'union members.'

"By way of illustration complainant was discharged from his employment as a Radio Officer on a Central Gulf Lines vessel, because of a lack of 'clearance' from the American Radio Association, thereby violating not only his 'permanent' assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he had accumulated in three and one half years of employment in the trade.

"Many Captains, Mates and Radio Officers of the American Export Lines were discharged because non-membership in the unions that Farrell Lines had a bargaining agreement with when Farrell Lines bought the American Export Line vessels.

"Radio Officers of the Prudential Steamship Company lost their jobs when Farrell Lines bought those ships and required those American Radio Association members to join the Radio Officers Union or be discharged.

"Unlicensed seamen on National Maritime Union and Seafarers Union contract ships have been discharged and refused referral from the exclusive preferential hiring halls of these unions. Likewise seamen have been prevented from entering the trade because of the closed shop, pre-hire agreements in the maritime industry.

"Respondents and the ARA and ROU unions have received subsidy payments from the Maritime Administration and have been unjustly enriched to the detriment of complainant and other seamen similarly situated in violation of the Shipping Act and seamen's statutes protecting seamen in their employment and entrance into the trade."

On the basis of the foregoing, Mr. Peltzman prays that the Commission (1) "declare that the bargaining agreements which were not filed until 1978

were illegal and could not be enforced against complainant and other seamen similary situated before the agreement was filed and approved," (2) award reparations "retroactive from the date of discharge of complainant from the Central Gulf Lines vessel to the present, and continuing until rehired by Central Gulf Lines or triple damages because of the violation of the anti-trust laws relating to monopoly in employment, . . ." and (3) determine "that insofar as the agreements call for an exclusive pre-hire preferential hiring hall referral system," and " union membership" as a condition of employment, the agreements, unless modified are unlawful and may not be approved. Finally Mr. Peltzman prays "that the Commission investigate the illegal hiring hall and training facilities in the maritime industry which are subsidized by the Maritime Administration, and order that the agreements be modified so as to conform to the requirements of sections 15, 16 and 17 of the Act."

Before dealing with the merits of the various motions now before me, a summary of what one respondent has called Mr. Peltzman's "legal odyssey" is necessary to any understanding of the complaint in this case. The facts set forth below are taken from an unchallenged affidavit of Mr. C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal courts. Official notice is taken of those decisions and orders pursuant to Rule 226 of the Commission's Rules of Practice and Procedure. The affidavit, orders and decisions can be found in the Appendix to Central Gulf's Motion to Dismiss Complaint.

Mr. Peltzman was first employed by Central Gulf in May 1970 as a radio operator on the *SS Green Ridge* and completed three voyages aboard the vessel. Then and since, Central Gulf employed radio operators on its vessels under agreements with the American Radio Association, a union of radio operators. 2/ All of these agreements contained a "union security clause" which provides:

> (b) The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

In May 1971, the Association advised Central Gulf that Mr. Peltzman had not paid his union initiation fees and on May 28, 1971, Central Gulf told Mr. Peltzman that because of its agreement with the Association, he would "not be able to rejoin the vessel without prior clearance from the union." In September of 1971, Mr. Peltzman filed charges with the National Labor Relations Board (NLRB) alleging that the union's refusal to clear him for employment on a central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices in violation of the National Labor Relations Act. He also charged the union with violating the National Labor Relations Act because of the Union's refusal to enroll him in "the industry school," which refusal was allegedly based solely on the fact that Mr. Peltzman was not a union member.

On October 26, 1971, the NLRB's Region 2 found Mr. Peltzman's charges to be without merit saying:

2/ The current agreement between Central Gulf and the Association became effective June 16, 1978, and expires June 15, 1981. There have been and there are now no other agreements between Central Gulf and anyone else concerning the employment of radio operators.

> The evidence does not tend to establish that the . . . Union violated the National Labor Relations Act. The evidence establishes that pursuant to a valid Union security agreement you were obligated to pay an initiation fee to the Union which you refused to do after notification by the Union that such fees were due. Under such circumstances the refusal by the Union to refer you to your former permanent position aboard the *S.S. Green Ridge* was permissible.
>
> Insofar as the charge alleges that you were not enrolled in the industry school because of your lack of membership in the Union, the evidence does not support such claims, inasmuch as you failed to qualify for admission to the course for which you sought enrollment and admission to the school is not limited to Union members. (Central Gulf Appendix, page 8.)

The findings of Region 2 were confirmed by the NLRB's General Counsel and Mr. Peltzman's appeals from those decisions were unsuccessful. (*Peltzman v. NLRB*, 2d Cir., Dkt. No. 70-1091, unreported orders of dismissal and rehearing contained in Central Gulf Appendix pages 15 and 16; *certiorari denied*, 409 U.S. 887; *rehearing denied*, 409 U.S. 1050.)

It appears that at the same time Mr. Peltzman was seeking relief from the NLRB, he was pursuing other remedies in the courts of New York State where he sought to enjoin the union and collect damages for the termination of his employment on Central Gulf vessels. These actions were dismissed because the subject matter was within the exclusive jurisdiction of the NLRB. *Peltzman v. American Radio Association*, 69 Misc. 2nd 17, 327 N.Y. Supp. 2d 505 (1971); *affirmed*, 40 A.D. 2d 631 (N.Y. Supp. Ct. App. Division 1971), 335 N.Y. Supp. 2d 998 (1971); *Certiorari denied*, 411 U.S. 916; *rehearing denied*, 411 U.S. 977 (1973).

Having been turned down by the NLRB and the New York courts, Mr. Peltzman then filed suit against Central Gulf in the United States District Court for the Southern District of New York but again the result was the same with the

Supreme Court denying rehearing in 1976.[3/] The gravamen of Mr. Peltzman's action in the District Court was described by the Court of Appeals as consisting of ". . . a myriad of claims . . . based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement. . . ." The Court disposed of the claims saying:

> Most of Peltzman's arguments can be dealt with summarily. Nothing in maritime law renders illegal a discharge that is authorized under a legitimate union security clause. There is no colorable basis for an antitrust claim. The security clause here is not subject to attack under the federal or New York constitutions . . . And any claim that the company committed an unfair labor practice in discharging him would plainly be subject to the exclusive jurisdiction of the NLRB.

The record does not disclose what other actions, if any, Mr. Peltzman might have taken during the period from 1976 when the Supreme Court last denied rehearing to October of last year when he filed this complaint with the Commission. Motions to dismiss Mr. Peltzman's complaint have been filed by or on behalf of virtually every respondent in the case. The arguments for dismissal run from the complaint being barred through lack of jurisdiction over some of the respondents to failure to state a cause of action.

Before getting to the merits of the various substantive grounds for dismissal a word or two should be said about a procedural ground which has

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3/ *Peltzman v. Central Gulf Lines, Inc.*, 86LRRM2127, ___ F. Supp. ___ (SDNY 1974); *affirmed in part and remanded for a single fact determination*, 497 F 2d 332 (2d Cir. 1974) *decision on remand* 88LRRM2924, ___ F. Supp. ___ (SDNY 1974), not officially reported; affirmed, 523 F.2d 96 (2nd Cir. 1975) *certiorari denied*, 423 U.S. 1974; rehearing denied, 424 U.S. 979 (1976). These decisions can be found in the Central Gulf Appendix pages 17-26.

been argued by a number of respondents, i.e. that the complaint fails to meet the requirements of Rule 62 of the Commission's Rules of Practice and Procedure. That rule requires that complaints contain, (1) a concise statement of the cause of action, (2) a request for relief or other affirmative action sought, and (3) identification of ports of origin and destination and other particulars of shipments when reparations are sought. The main thrust of the procedural argument is that the complaint utterly fails to concisely state the cause of action--the complaint is so confusingly drafted that respondents are virtually reduced to divination to find what violations they are charged with.

Mr. Peltzman, who is appearing without counsel, has, it must be admitted, been somewhat less than lucid in stating his grievance. However, the various motions to dismiss demonstrate that the respondents have little doubt as to the precise nature of Mr Peltzman's charges. Moreover, were the complaint defective for its lack of clarity, the appropriate remedy would not be dismissal but leave to amend.

Two statements in the complaint provide the key to the nature of Mr. Peltzman's grievance. First Mr. Peltzman describes himself as a "Marine Radio Officer . . . who has been deprived of employment on [certain] vessels . . . due to the monopolistic and illegal exclusive preferential hiring hall bargaining agreements negotiated by the American Maritime Association, and the Pacific Maritime Assn. with the American Radio Association, and the Radio Officers Union." And later in the complaint Mr. Peltzman states, "This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and union membership requirement in the

agreement which is placed on seamen who to enter the service of shipping companies, and who wish to retain those jobs without being forced to join a union or be discharged from employment if they do not join a union which has an exclusive preferential hiring hall agreement, commonly called a prehire or closed shop agreement. . . ."

From this it is clear that the real grievance of Mr. Peltzman is the requirement that he join a union before he can be employed as a radio officer on the vessels of those shipping companies which have union contracts containing closed shop or union security clauses. It is equally clear that Mr. Peltzman feels that the Commission's jurisdiction over this grievance is to be found in section 15 of the Shipping Act.[4/] Mr. Peltzman is also aware that since 1968, the Commission has exercised jurisdiction, albeit expressly limited, over some provisions of collective bargaining agreements for in a reply to the motions to dismiss he cites *Volkswagenwerk Aktiengesellschaft v. F.M.C.*, 390 U.S. 261 (1968).[5/] Thus the question becomes does or can whatever jurisdiction the Commission has or had over labor-management agreements extend to provisions which establish union membership as a condition precedent to employment as a radio officer in the U. S. Merchant Marine. While it is unnecessary to review the complete history of the Commission's involvement in labor agreements, some

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4/ In paragraph 9 of his complaint Mr. Peltzman states, "This proceeding arises under Section 15 of the Shipping Act, 1916, as amended, 46 USC Sec. 814."

5/ Mr. Peltzman cites *Volkswagen, supra*, solely for the proposition "that the public interest is violated by this type of agreement," i.e. closed shop.

consideration of the leading cases is necessary to show just why Mr. Peltzman's complaint is without the Commission's jurisdiction.

In 1965 the Commission issued its decision in *Volkswagenwerk Aktiengesellschaft v. Marine Terminals*, 9 F.M.C. 77. Volkswagen's complaint in that case charged that the agreement between members of the Pacific Maritime Association (PMA) establishing the method of assessing cargoes for contributions to pay their obligations under an agreement with the International Longshoremen's and Warehousemen's Union (ILWU) violated section 15 of the Shipping Act.[6/]

In 1960 the ILWU agreed to the introduction of labor saving devices and the elimination of certain restrictive work practices. In return the PMA agreed to create a $29,000,000 "Mechanization and Modernization Fund" to be used to mitigate the impact upon employees of technological unemployment. The agreement specifically reserved to the PMA alone the right to determine how to raise the Fund from its members. PMA decided to raise the money for the fund by an assessment on each revenue ton of cargo handled.

Volkswagen in its action before the Commission charged that the method of allocating the assessment was discriminatory as applied to its automobiles and that the agreement itself was unenforceable because it had not been filed with or approved by the Commission under section 15 of the Shipping Act. The

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6/ PMA is an employer organization of some 120 principal common carriers by water, stevedoring contractors and marine terminal operators representing the Pacific Coast shipping industry. The primary function of PMA is to negotiate and administer collective bargaining agreements with unions representing its member's employees of which the ILWU is one.

Commission dismissed the complaint concluding it was not the kind that required filing under section 15. The Court of Appeals affirmed the Commission and the case then went to the Supreme Court. The Supreme Court reversed the Commission finding that the agreement did fall within the ambit of section 15 and after reaching their conclusion the Court went on to say:

> It is to be emphasized that the only agreement involved in this case is the one among members of the Association [PMA] allocating the impact of the Mech Fund levy. We are not concerned here with the agreement creating the Association or with the collective bargaining agreement between the Association and the ILWU. No claim has been made in this case that either of those agreements was subject to the filing requirements of section 15. Those agreements reflecting the national labor policy of free collective bargaining by respresentatives of the parties own unfettered choice, fall in an area of concern to the National Labor Relations Board, and nothing we have said in this opinion is to be understood as questioning their continuing validity. But in negotiation with the ILWU, the Association insisted that its members were to have the exclusive right to determine how the Mech Fund was to be assessed, and a clause to that effect was included in the collective bargaining agreement. That assessment arrangement affecting only relationships among Association members and their customers, is all that there is before us in this case.

Several points are clear from the Court's decision: (1) the agreement in question was between persons subject to the Act, (2) the agreement has a direct impact upon persons protected by the Act, i.e. shippers, and (3) the agreement was not a collective bargaining agreement reflecting the national labor policy which is the exclusive concern of the NLRB. The Supreme Court's decision in Volkswagen faced the Commission with the problem of "reconciling or accommodating Shipping Act policies with labor act policies." The Commission dealt with the problem in *United Stevedoring Corp. v. Boston Shipping Assoc.*, 16 F.M.C. 7 (1972). In that case, the Commission decided to apply the so-called "labor exemption" to certain agreements which might otherwise fall under section 15.

The labor exemption was created as a means of accommodating the national policies embodied in the antitrust laws and the labor laws. The labor exemption rendered "pure" collective bargaining agreements immune from attack under the antitrust laws. The Commission found the analogy to a labor exemption from the shipping laws "obvious," and after a review of the leading cases on the labor exemption from the antitrust laws, the Commission developed the following criteria to be used in granting "labor related" agreements a labor exemption from the "shipping laws":

> 1. The collective bargaining agreement which gives rise to the activity in question must be in good faith. Other expressions used to characterize this element are "arms-length" or "eyeball to eyeball."
>
> 2. The matter is a mandatory subject of bargaining, e.g. wages, hours or working conditions. The matter must be a proper subject of union concern, i.e., it is intimately related or primarily and commonly associated with a bona fide labor purpose.
>
> 3. The result of the collective bargaining does not impose terms on entities outside of the collective bargaining group.
>
> 4. The union is not acting at the behest of or in combination with nonlabor groups, i.e., there is no conspiracy with management. (16 F.M.C. 13).

Application of these criteria to the agreements Mr. Peltzman says violate the Shipping Act clearly demonstrates that the agreements come under the labor exemption and thus are immune from challenge under the Shipping Act. 7/

7/ Mr. Peltzman refers to only two agreements with anything approaching specificity--"From 1948 to 1977 AMA and PMA did not file with the Commission the agreements negotiated by ARA and ROU. . . ." There are a number of unclear references to other "agreements."

First, there is no allegation that the agreements were not the product of "arms length" or "eyeball to eyeball" bargaining.

Second, the challenged provisions are mandatory bargaining subjects. *NLRB v. General Motors*, 373 U.S. 734 (1963); *Oneita Knitting Mills v. NLRB*, 375 F2d 385 (4th Cir. 1967). "Closed shop" or union security clauses are proper union concerns and are primarily and commonly associated with a bona fide labor purpose.

Third, the result of the challenged clause in the collective bargaining agreements does not impose terms on entities outside the bargaining group which are protected by or subject to the provisions of the Shipping Act.

Fourth, there is no allegation that the unions were or are acting at the behest or in combination with nonlabor groups, i.e. there is no conspiracy with management. Even if a conspiracy were alleged it would of necessity deal with matters which are the exclusive concern of the NLRB and beyond the jurisdiction of the Federal Maritime Commission.

Thus, since at least 1972, the allegedly unlawful agreements have or would if challenged, been exempt from and therefore immune to any attack under section 15 of the Shipping Act, 1916. In other words, since at least 1972, the labor exemption has applied to agreements of the kind challenged by Mr. Peltzman and the Commission since then has lacked jurisdiction over the subject matter of those agreements.

Mr. Peltzman also alleges that the agreements violate section 16 and 17 of the Act.[8/] Section 16 First provides:

8/ It must be assumed that Mr. Peltzman is relying on section 16 First since no other section is even remotely applicable to the complaint.

> It shall be unlawful for any common carrier by water, or other person subject to this Act, either alone or in conjunction with any other person, directly or indirectly:
>
> To make or give any undue or unreasonable preference or advantage to any particular person, locality or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (46 U.S.C. 815).

Though broadly worded, section 16 is clearly directed to the obligations of common carriers and other persons subject to the act to users of their services, i.e., the shipping public. See e.g. *Armstrong Cork Co. v. American Hawaiian SS Co.*, 1 U.S.M.C. 719 (1938); *Huber Mfg. Co. v. N.V. Stoomvart "Nederland,"* 4 F.M.B. 343, 347 (1953); *Afghan-American Trading Co. v. Isbrandtsen Co.*, 3 F.M.B. 622, 623 (1951); *Port of New York Authority v. AB Svenska*, 4 F.M.B. 202, 205 (1953); and *Pittston Stevedoring Corp. v. New Haven Terminal Inc.*, 13 F.M.C. 33, 35 (1969). Mr. Peltzman's charge is that he has been subjected to "prejudice and disadvantage in violation of section 16" because of the terms of the bargaining agreement relating to exclusive restrictive hiring referral practices and tenure of employment for 'union members' only. . . ." It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First—a section which was not intended to deal with offenses alleged.

Mr. Peltzman alleges that closed shop or union security clauses in bargaining agreements "constitute unjust and unreasonable regulations and practices in violation of Section 17 of the Act, and cause the agreement to

be unjustly discriminatory as between 'members' of the union and 'permit card members'. . . ." A simple reading of the language of section 17 shows that it has no applicability to the grievances of Mr. Peltzman.

The regulations and practices which section 17 requires to be just and reasonable are those "relating to or connected with the receiving, handling, storing or delivery of property." They clearly do not apply to the terms and conditions under which a common carrier will employ a "radio officer." The unjust discrimination forbidden by section 17 is discrimination in rates between shippers and ports. Again a condition not even remotely concerned with the employment of radio officers.

Finally, the complaint is time-barred by the two-year period of limitation in section 22 of the Act. The single allegation of harm is contained in paragraph 21 of the complaint where Mr. Peltzman says:

> . . . complainant was discharged from his employment as a Radio Officer on a Central Gulf Line vessel, because of lack of "clearance" from the American Radio Association, thereby violating not only his "permanent" assignment to the vessel but depriving him of health, welfare, vacation and pension benefits that he accumulated in his three and one half years of employment in the trade.

The record demonstrates that the discharge Mr. Peltzman is referring to took place in 1971.[9/] Mr. Peltzman's cause of action, if he had one, arose with his "discharge from employment" in May of 1971 when Central Gulf terminated

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9/ See affidavit of C. S. Larsen and the decisions in *Peltzman v. Central Gulf Lines Inc.*, 497 F2d 332 (CA2, 1974); *Peltzman v. NLRB*, 409 U.S. 877, *reh. denied*, 409 U.S. 1050; *Peltzman v. American Radio Assoc.*, 327 N.Y. Supp. 2d 505 (1971), *affirmed* 40 A.D. 2d 631 (N.Y. Sup. Ct. App. Div. 1971); 335 N.Y. Supp. 2d 998 (1971) (App 35); cert. denied 441 U.S. 916 (1973), *reh. den.* 411 U.S. 977(1973).

his employment because of Peltzman's refusal to pay his union initiation fees. Additionally in a letter reply to some of the motions to dismiss Mr. Peltzman argued that the motions "do not reach the thrust or substantive allegations in the complaint which allege in essence:

> 1. Illegal bargaining agreements not filed by the defendants in violation of the Shipping Act from 1948 to 1977.

Again this alleged violation is time-barred by section 22 of the Act.

The complaint of Mr. Archie Peltzman fails to state a casue of action upon which relief can be granted and is time barred. The complaint is dismissed.

John E. Cograve
Administrative Law Judge

FEDERAL MARITIME COMMISSION

(S E R V E D
(AUGUST 12, 1981
(FEDERAL MARITIME COMMISSIO

DOCKET NO. 80-69

ARCHIE PELTZMAN

v.

AMERICAN MARITIME ASSOCIATION, ET AL.

ORDER ADOPTING DISMISSAL OF COMPLAINT

This proceeding was initiated as a result of a Complaint filed by Archie Peltzman against the American Maritime Association (AMA), the Pacific Maritime Association (PMA), and the individual members of these Associations who are common carriers by water or "other persons subject to the Act" within the meaning of section 1, Shipping Act, 1916 (46 U.S.C. 801) (the Act).1/ Also named in the Complaint are several unions as well as a number of independent shipping companies. In all, the Complaint names some 185 entities alleged to have violated sections 15, 16 and 17 of the Act (46 U.S.C. 814, 815, 816), as well as the antitrust laws and numerous labor statutes. These violations are said to have resulted from the "union security clauses" of certain unspecified collective bargaining agreements which were allegedly neither filed with, nor

1/ This proceeding was initiated prior to the effective date of the Maritime Labor Agreements Act of 1980, P.L. 96-325, 94 Stat. 1021, which modified the Commission's jurisdiction over activities flowing from collective bargaining agreements.

approved by, the Commission and which allegedly deprived Complainant of employment as a radio operator on Respondents' vessels (Complaint, paragraphs 13, 14, 16, 17 and 21). Complainant requests that the Commission declare the agreements unlawful and seeks reparation under the Act or treble damages under the antitrust laws. Complainant also urges the Commission to investigate the hiring hall and maritime training facilities that are subsidized by the United States Maritime Administration.

This proceeding is now before the Commission upon Petition for Reconsideration filed by Complainant to the ruling of Chief Administrative Law Judge John E. Cograve dismissing the Complaint.[2/] Replies to the Petition have been filed by or on behalf of most of the Respondents in the proceeding.

DISCUSSION

In his Order dismissing the Complaint, the Presiding Officer concluded that Complainant had failed to state a cause of action upon which relief could be granted and that, in any event, the Complaint is barred by the two-year statute of limitations in section 22 of the Act (46 U.S.C. 821). The Presiding Officer first found that the agreements complained

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2/ Mr. Peltzman is appearing pro se. His Petition, though captioned as one for "reconsideration," is being treated as an appeal pursuant to Rule 227(b) of the Commission's Rules of Practice and Procedure (46 C.F.R. 502.227(b)). This Rule permits a party to seek Commission review of an administrative law judge's grant of a motion to dismiss a proceeding in whole or in part.

of, at least as they extend "to provisions which establish union membership as a condition precedent to employment as a radio operator in the U.S. Merchant Marine," are labor-exempt under the criteria established in United Stevedoring Corporation v. Boston Shipping Association, 16 F.M.C. / (1972) (BSA), and "thus are immune from challenge under the Shipping Act" (Order at 11 & 14).3/

Further, the Presiding Officer determined that section 16 of the Act is not intended to address the Complainant's allegation regarding "unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and 'union' membership requirement in the agreements which is placed on seamen who wish to enter the service of shipping companies" (Order at 4 and 16; Complaint paragraph 17). The Presiding Officer explained that although section 16 is broadly worded, it is "clearly directed to the obligations of common carriers and other persons subject to the Act to users of their services, i.e. the shipping public" rather than to an employee's grievance against an employer and the union. He also noted that it would be "absurd" to recognize a "labor exemption" under BSA to reconcile conflicting labor and shipping policies on the one hand and to undermine that exemption by taking

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3/ It was unnecessary for the Presiding Officer to have considered other provisions of the collective bargaining agreements because they were not put in issue. Accordingly, the Commission will not adopt that portion of the Order which implies that the Agreements are exempt in their entirety (see Discussion, infra).

jurisdiction under section 16 - "a section which was not intended to deal with offenses alleged" (Order at 16) on the other.

Section 17 of the Act was likewise found to be inapplicable to the charges advanced in the Complaint. The Presiding Officer ruled that the regulations and practices which section 17 requires to be reasonable relate to receiving and handling property and not to the terms and conditions of a radio officer's employment by a common carrier by water (Order at 17).

In concluding that the Complaint is, in any event, barred by the two-year statute of limitations, the Presiding Officer relied on the affidavit of C. S. Larsen, Vice President, Marine Division, Central Gulf Lines, and various decisions and orders of the National Labor Relations Board, the New York State courts and Federal Courts. The Presiding Officer found that Mr. Peltzman's cause of action, if any, arose from his "discharge from employment" in May of 1971 when Central Gulf terminated his employment because of a refusal to pay union initiation fees (Order at 17).

Complainant appeals from the Presiding Officer's dismissal on essentially five grounds:

(1) the Presiding Officer applied an erroneous standard in considering the alleged violations of the Shipping Act;

(2) the Presiding Officer committed procedural errors;

(3) the Presiding Officer committed factual errors;

(4) the Presiding Officer failed to consider all of the Respondents' pleadings and arguments; and

(5) the Presiding Officer erred in finding that the Complaint is time-barred.

The Complainant argues that the "union security" provisions of the agreements complained of are illegal restraints of trade and are therefore contrary to the public interest and must be investigated by the Commission. Complainant maintains that the purpose of the Shipping Act, 1916, and related statutes is not only to assure a strong merchant marine but also to protect merchant seamen. He further submits that the Commission may not approve an agreement under the public interest standard of section 15 if it violates either labor statutes or the antitrust laws.

Complainant also argues that the Presiding Officer erred in failing to convene a prehearing conference or any hearings in this proceeding, in dismissing the Complaint prior to the receipt of all the Respondents' answers thereto, and in not specifically considering and addressing all of his pleadings and arguments.

Mr. Peltzman further contends that the Presiding Officer's finding that the Larsen affidavit went unchallenged is erroneous. This affidavit was allegedly rebutted in Complainant's December 5, 1980 Reply to the Motions to Dismiss. The Presiding Officer also allegedly erred in stating that Complainant had cited Volkswagenwerk Aktiengesellschaft v. FMC, 390 U.S. 261 (1968), as an indication that Complainant was cognizant of the Commission's jurisdiction over matters arising out of collective bargaining agreements. Finally, Mr. Peltzman contends that his Complaint is not time-barred because,

although he was discharged in 1971, the "illegal closed shop and restrictive hiring hall practices are still continuing."4/ (Petition at 9).

The several Respondents replying to Complainant's appeal all urge the Commission to deny the appeal and to affirm the Presiding Officer's dismissal.

Complainant's appeal presents the Commission with no reason for setting aside the Presiding Officer's ruling. The Presiding Officer's ultimate conclusions are well-reasoned and are supportable procedurally and in law and fact. The Order of Dismissal is therefore adopted by the Commission, subject to the modifications and clarifications discussed below. The Commission shall, however, first dispose of certain procedural challenges.

Rule 64 of the Commission's Rules of Practice and Procedure, 46 C.F.R. 502.64, provides that answers to complaints shall be filed within 20 days of the service of the complaint, unless a motion to dismiss the complaint is filed. This Rule further states that the answer to the complaint need

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4/ The provisions or agreements at issue here have been variously referred to by the parties as "closed shop" or "union security" provisions. The various tribunals where Mr. Peltzman has sought relief have characterized the provisions complained of as "union security" provisions (see for example Peltzman v. Central Gulf Lines, Inc., 86 L.R.R.M. 2127 (1974) and footnote 7, infra). They are so referred to in this Order.

not be filed until such motion has been denied. Complainant did not request relief as provided for in Rule 64, has not demonstrated how he was harmed by the failure of any Respondent to timely answer his Complaint, nor has the Commission been able to perceive any harm accruing from failure by any Respondent to timely answer Mr. Peltzman's Complaint.[5/] The Commission therefore finds that if any such failure existed, it constituted harmless error, particularly in light of the Commission's ultimate disposition of the Complaint.

Similarly, Complainant has failed to establish how he was prejudiced by the absence of a pre-hearing conference or evidentiary hearings. The Commission Rules provide the Presiding Officer broad discretion in structuring the proceeding (See Rule 94, 46 C.F.R. 502.94). The Commission cannot find that the Presiding Officer abused that discretion. The disposition of this proceeding, on the basis of the Motions filed, turned on questions of law, thus obviating any need for evidentiary hearing procedures.

Finally, it is a well-settled principle that administrative decisions need not recite or respond to each and every argument or finding propounded by a party to a proceeding.[6/] The

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5/ The one Respondent alleged not to have filed an answer, the Seafarers International Union, filed its answer on November 24, 1980.

6/ See Mediterranean Pools Investigation, 9 F.M.C. 264, 267 (1966), citing NLRB v. State Center Warehouse and Cold Storage Company, 193 F.2d 156 (9th Cir. 1951); and NLRB v. Sharpless Chemicals, Inc., 209 F.2d 645 (6th Cir. 1954).

Presiding Officer's ruling in this proceeding addresses all the material matters raised by the pleadings.7/ The arguments that Complainant submits were not considered by the Presiding Officer relate primarily to the merits of his Complaint rather than the gravamen of the Motions to Dismiss, i.e., the lack of Commission subject matter jurisdiction and the failure to state a claim upon which relief can be granted.

It is the absence of subject matter jurisdiction and the failure to state a claim upon which relief can be granted which mandates the dismissal of the Complaint. The essence of the Complaint is that certain collective bargaining agreements or their provisions require membership in the union as a condition to employment on Respondent's vessels. (Order at 11). These "union security" agreements or provisions are at the heart of the Complaint. Despite sweeping statements concerning the unlawfulness of the collective bargaining agreements in their entirety, the focus of the Complaint is:

7/ The facts relied upon by the Presiding Officer are contained in the various decisions and orders of the National Labor Relations Board, and the Federal and New York State courts, as well as Mr. Larsen's affidavit. Commission Rule 226, 46 C.F.R. 502.226, permits the taking of official notice of these decisions, thus mooting any challenges to the Presiding Officer's consideration of Mr. Larsen's affidavit. In any event, the matters allegedly rebutted by Mr. Peltzman's December 5, 1980 Reply were not relied upon nor pertinent to the Presiding Officer's basis for dismissal. Similarly, the Commission perceives no harm in the Presiding Officer's misreference to Volkswagenwerk, supra, because he properly noted the proposition relied on in a footnote (Order at 11). Moreover, it is irrelevant to the matter at issue whether Complainant was in fact previously aware of the Commission's jurisdiction over collective bargaining agreements (Id.).

> . . . directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements . . . placed on seamen who wish to enter the service of shipping companies . . . [Emphasis supplied] (Complaint, paragraph 17).

Complainant's grievance therefore addresses pure employer-employee/union matters which are not cognizable under the Shipping Act.[8/] See New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215, 1220 (2d Cir.), cert. den. 419 U.S. 964 (1974). Cf. Federal Maritime Commission v. Pacific Maritime Association (PMA), 435 U.S. 40 (1978).[9/]

This agency's jurisdiction attaches to the provision of common carrier services in the domestic offshore and foreign ocean trades of the United States.[10/] Within the context of this proceeding, it is concerned with the regulation of common carriers subject to its jurisdiction, and not the

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8/ Such matters appear to fall within the province of the National Labor Relations Act.

9/ In PMA, the Supreme Court recognized that collective bargaining agreements could be subject to section 15 of the Shipping Act and found such an agreement so subject when it imposed terms relating to employer competition in providing transportation related services upon employers not members of a multi-employer bargaining unit.

10/ "The FMC has no concern with so much of [a collective bargaining agreement] as provides what wages and other benefits shall be paid to the longshoremen, grievance procedures and similar matters." New York Shipping Association, supra, at 1220.

individual seamen employed by those carriers.[11] The transportation activities of such carriers present Shipping Act considerations; their employment relationships, standing alone, do not.[12] It follows, therefore, that the Complaint does

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11/ This proceeding presents a factual situation far removed from the type of transportation practice growing out of collective bargaining agreements whereby carriers refuse to tender containers to certain classes of shippers or tender them only subject to additional charges, or from situations involving the imposition of charges by common carriers against the users of their transportation services to fund longshoremen's benefits, the usual situations in which our jurisdiction has come into play. See e.g. Volkswagenwerk v. FMC, 390 U.S. 261 (1968); New York Shipping Association, Inc. v. Federal Maritime Commission, 495 F.2d 1215 (2nd Cir. 1974), cert. den., 419 U.S. 964 (1974); Transamerican Trailer Transport, Inc. v. FMC, 492 F.2d 617 (D.C. Cir. 1974); New York Shipping Ass'n v. FMC, 571 F.2d 1231 (D.C. Cir. 1978); New York Shipping Ass'n v. FMC, 628 F.2d 253 (D.C. Cir. 1980); United States v. Sea-Land Service, Inc., 424 F.Supp. 1008 (D.N.J. 1977), appeal dismissed, 577 F.2d 730 (3rd Cir. 1978) (table), cert. denied, 439 U.S. 1072 (1979); South Atlantic and Caribbean Line, Inc., 12 F.M.C. 237 (1969); Docket Nos. 73-17, Sea-Land Service, Inc. and Gulf Puerto Rico Line, Inc. - Proposed Rules on Containers and 74-40, Puerto Rico Maritime Shipping Authority - Proposed ILA Rules on Containers (June 14, 1978), pending appeal sub nom. CONASA and NYSA v. FMC and USA, D.C. Cir. No. 78-1776.

12/ In NAACP v. Federal Power Commission, 425 U.S. 662 (1976), the Supreme Court ruled on the applicability of the public interest standard of the Federal Power Act, 41 Stat. 1063, and the Natural Gas Act, 52 Stat. 821, to employment practices of the regulated industry. In rejecting the contention that the public interest criterion authorized the Federal Power Commission to "concern itself with discriminatory employment practices on the part of the companies it regulates," the Court explained:

> This Court's cases have consistently held that the use of the words "public interest" in a regulatory statute is not a broad license to promote the general welfare. Rather, the words take meaning from the purpose of the regulatory legislation.

[Footnote continued on next page].

not allege matters which, if true, would establish a violation of the Shipping Act, 1916. The Complaint must accordingly be dismissed as a matter of law.

The language of sections 16 and 17, even if broadly construed, could not be interpreted to apply to Complainant's grievance. The Commission will therefore adopt the Presiding Officer's disposition of these allegations with the following clarification. After concluding that the Complaint does not state a cause of action under section 16, the Presiding Officer noted that:

> It would be patently absurd to, on the one hand, create a labor exemption to reconcile the conflicting labor and shipping policies and on the other nullify the reconciliation through an assumption of jurisdiction under section 16 First - a section which was not intended to deal with the offenses alleged. (Order at 16).

Notwithstanding the last modifying phrase, this statement could suggest that once a particular agreement is determined to be

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12/ [Footnote continued from preceding page.]

> For example, in the case of the Interstate Commerce Commission . . . the term "public interest" . . . is not a concept without ascertainable criteria but has a direct relation to the adequacy of transportation service . . . . (at 669, citations omitted).

The Court further stated:

> [I]t could hardly be supposed that in directing the Federal Power Commission to be guided by the "public interest" Congress thereby instructed it to take original jurisdiction over the processing of charges of unfair labor practices on the part of its regulatees. (at 671).

"labor exempt" from the filing and approval requirements of section 15, the activities contemplated by the agreement are also immune from other sections of the Shipping Act, 1916. This result is inconsistent not only with the BSA decision relied on by the Presiding Officer, but with court decisions indicating that action which is "labor exempt" from the reach of section 15 may nevertheless be subject to section 16 of the Act. See, e.g., Pacific Maritime Ass'n v. FMC, 543 F.2d 395, 410, 411, fn. 39 (D.C. Cir. 1976), reversed on other grounds sub nom. FMC v. Pacific Maritime Ass'n, 435 U.S. 40 (1978); FMC v. Pacific Maritime Ass'n, 435 U.S., supra, at 68, 74-75, 77 (dissent of Justice Powell). Accordingly, the Commission will not adopt the sentence quoted above from page 16 of the Order.

There is one final matter that warrants clarification. The Presiding Officer concluded that the Complaint is barred by the two-year statute of limitations in section 22 of the Act. The limitation in section 22, however, applies only to claims for reparation and does not act as a bar to requests for other relief. This fact is not significant here, however, because Complainant has not otherwise stated a claim upon which relief can be granted.

THEREFORE, IT IS ORDERED, That Complainant's Petition for Reconsideration is denied.

IT IS FURTHER ORDERED, That the March 13, 1981 Order of Dismissal in this proceeding is adopted by the Commission as modified and clarified above.

By the Commission.*

Francis C. Hurney
Secretary

*Chairman Green did not participate.

APPENDIX F

A. Section 15, Shipping Act, 1916 (29 U.S.C. Sec. 814)

"Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apporting earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in

any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements.

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving different ...

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CLERK

No. 82-121

In the Supreme Court of the United States

OCTOBER TERM, 1982

ARCHIE PELTEMAN, PETITIONER

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a court of appeals may decide the merits of an appeal on a motion to affirm.

2. Whether the Federal Maritime Commission has jurisdiction under Sections 15, 16 or 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 or 816, over a vessel owner's discharge of a marine radio operator based on his refusal to join the radio operators' union within 30 days of hiring, as required by a collective bargaining agreement.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-181

ARCHIE PELTZMAN, PETITIONER

v.

FEDERAL MARITIME COMMISSION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The orders of the court of appeals (Pet. App. 1a-4a) are not reported. The order of the Administrative Law Judge dismissing petitioner's complaint (Pet. App. 5a-22a), and the order of the Federal Maritime Commission adopting the dismissal of the complaint (Pet. App. 23a-35a), are reported at 20 Shipping Reg. Rep. (P & F) 939 and 20 Shipping Reg. Rep. (P & F) 1479, respectively.

JURISDICTION

The judgment of the court of appeals (Pet. App. 1a-2a) was entered on March 29, 1982, and a petition for rehearing was denied on May 19, 1982 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on August 2, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTE

Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816, are set forth in pertinent part in Appendix A, *infra*, 1a-3a.

STATEMENT

Petitioner seeks review of the Federal Maritime Commission's dismissal of his complaint on the ground that it failed to allege a violation of the Shipping Act of 1916, 46 U.S.C. 801 *et seq.*, and, to the extent that it sought reparation, that it was not filed within the applicable period of limitations. The underlying facts are set forth in *Peltzman* v. *Central Gulf Lines, Inc.*, 86 L.R.R.M. (BNA) 2127 (S.D. N.Y.) (summary judgment), rev'd in part, 497 F.2d 332 (2d Cir.), on remand, 88 L.R.R.M. (BNA) 2924 (S.D.N.Y. 1974), aff'd, 523 F.2d 96 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

In 1949, the Coast Guard refused to issue petitioner, a marine radio officer, a radio operator's license on the ground that he was either a member of the Communist Party or a Communist Party sympathizer. Without a license, petitioner could not continue to work in the Merchant Marine, and in 1950 he was expelled from the American Radio Association, a labor union, for failure to pay his dues. After filing suit against the Coast Guard in 1967, petitioner secured a new license and the Union issued him a "permit card," allowing him to sail for one year without paying the Union's $2,000 initiation fee. Thereafter, however, the Union demanded the full fee. Petitioner refused to pay the initiation fee, claiming that as a former member he should be required to pay only the lesser "withdrawal fee." 497 F.2d at 333. In May 1971, his employer, respondent Central Gulf Lines, Inc., discharged him pursuant to the "union security clause" contained in its collective

bargaining agreement with the Union. This clause provided (Pet. App. 11a):

> The Company agrees, as a condition of employment, that all employees in the bargaining unit shall become and remain members of the Union thirty (30) days after date of hiring.

Petitioner then began a series of legal actions. He first took his claim to the National Labor Relations Board, alleging that the Union's refusal to clear him for employment on a Central Gulf vessel and Central Gulf's subsequent refusal to employ him were unfair labor practices. But the Regional Director found the union security clause valid and refused to file a complaint, and the General Counsel affirmed that decision (Pet. App. 11a-12a). The Second Circuit dismissed petitioner's appeal from the bench, *Peltzman* v. *NLRB*, No. 72-1091 (Apr. 4, 1972), and this Court denied a petition for certiorari, 409 U.S. 887 (1972). At the same time petitioner was seeking relief from the NLRB, he was also pursuing a breach of contract action against the Union in New York State court. That suit was dismissed on the ground that the NLRB had exclusive jurisdiction. *Peltzman* v. *American Radio Association*, 69 Misc.2d 17, 327 N.Y.S.2d 505 (Sup. Ct. 1971), aff'd mem., 40 A.D.2d 631, 335 N.Y.S.2d 998 (App. Div. 1972), cert. denied, 411 U.S. 916 (1973). Petitioner next sought relief against his former employer, respondent Central Gulf Lines, Inc., in federal court, where he "raised a myriad of claims * * * based on maritime law, the New York and federal constitutions, the antitrust laws, and the collective bargaining agreement * * *" (497 F.2d at 333). In essence, petitioner's claim was that Central Gulf Lines had unlawfully acceded to the Union's request that it discharge petitioner for failing to pay the $2,000 initiation fee. All of peti-

tioner's claims were rejected. *Peltzman* v. *Central Gulf Lines, Inc.*, 86 L.R.R.M. (BNA) 2127 (S.D. N.Y.) (summary judgment), rev'd in part, 497 F.2d 332 (2d Cir.), on remand, 88 L.R.R.M. (BNA) 2924 (S.D.N.Y. 1974), aff'd, 523 F.2d 96 (2d Cir. 1975), cert. denied, 423 U.S. 1074 (1976).

Petitioner initiated the instant action by filing a complaint with the Federal Maritime Commission against approximately 185 parties, including the American Maritime Association and the Pacific Maritime Association (maritime multiemployer bargaining organizations), the American Radio Association and the Radio Officers Union (unions representing marine radio operators) and several ocean common carriers, including respondent Central Gulf. Pet. App. 5a-6a. Petitioner alleged (Pet. App. 7a-8a):

> This complaint is directed solely to the unlawful and discriminatory pre-hire exclusive hiring hall arrangements, and "union" membership requirement in the agreement which is placed on seamen who wish to enter the service of shipping companies, and who wish to retain those jobs without being forced to "join" a union or be discharged from employment if they do not "join" a union which has an exclusive preferential hiring hall agreement, commonly called a pre-hire, or closed shop agreement, requiring membership as a condition of employment or referral by a union as a condition of employment.

He contended that such union security agreements violated Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816. Since the collective bargaining agreements containing the union security provisions had not been approved by the FMC,[1]

[1] Section 15 of the Shipping Act of 1916, 46 U.S.C. 814, requires that certain types of agreements among ocean common carriers be approved by the FMC and makes it unlawful to

petitioner asked that they be declared unlawful and unenforceable, and that he be granted reparation.

The Commission's Chief Administrative Law Judge (ALJ) dismissed petitioner's complaint on the grounds that the Commission lacked jurisdiction over it and that it was barred by the two-year statute of limitations contained in Section 22 of the Act, 46 U.S.C. 821 (Pet. App. 15a-22a). The Commission affirmed the ALJ's order of dismissal subject to certain modifications and clarifications (Pet. App. 23a-35a).

On petition for review, the court of appeals granted the Commission's motion for summary affirmance (Pet. App. 1a-2a).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review by this Court therefore is not warranted.

1. Petitioner contends (Pet. 14-16) that the court of appeals violated his procedural rights by granting the Commission's motion for summary affirmance. Summary disposition of an appeal on motion, however, is sanctioned by Rule 16 of the Rules of this Court as well as by decisions of the courts of appeals construing Fed. R. App. P. 27. See, *e.g.*, *Antal* v. *District 5, UMW*, 451 F.2d 1187 (3d Cir. 1971); *Sanders* v. *Crouse*, 429 F.2d 37 (10th Cir. 1970); *United States* v. *Fields*, 423 F.2d 1221 (4th Cir. 1970). See also Fed. R. App. P. 2.[2] Moreover, the

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carry out such agreements "before approval or after disapproval."

[2] Petitioner relies (Pet. 15-16) on *Kemph* v. *Estelle*, No. 79-2565 (5th Cir. Nov. 9, 1979) (App. B, *infra*, 4a-7a), in which the court denied a motion to dismiss an appeal. The decision in that case, however, was grounded largely on the operating procedures of the Fifth Circuit and that court's

procedure followed by the District of Columbia Circuit in this case is specifically authorized by its Rule 6(g).[3]

Petitioner had ample opportunity to present his argument to the court of appeals. The court decided the appeal only after petitioner had filed a response to the Commission's motion for summary affirmance and a further response in answer to Central Gulf's pleading in support of the Commission's motion (see Pet. App. 1a).[4] Neither the due process clause nor the Federal Rules of Appellate Procedure requires more.[5]

Rule 20 (App. B, *infra*, 5a-7a). In any event, the Fifth Circuit withdrew the decision from publication after it was published in the advance sheets, 606 F.2d 518*, editors note, and the case subsequently was decided without oral argument under Rule 18 of the Rules of the Fifth Circuit. *Kemph* v. *Estelle*, 621 F.2d 162 (1980).

[3] District of Columbia Circuit Rule 11, which petitioner cites (Pet. 14-15), deals with the disposition of fully briefed cases without oral argument, rather than disposition on a motion for summary affirmance prior to full briefing.

[4] Petitioner's opening brief and joint appendix also were already on file. Pet. 9.

[5] The procedure followed by the Commission was equally proper. Where, as here, no material question of fact was raised, it was appropriate for the Commission to rule on petitioner's complaint without holding evidentiary hearings, and to dismiss the complaint where the alleged facts, if proven, would have established no violation of statutes administered by the Commission. See, *e.g.*, *Delaware River Port Authority* v. *FMC*, 536 F.2d 391, 392 (D.C. Cir. 1976); *Outward Continental North Pacific Freight Conference* v. *FMC*, 385 F.2d 981, 984 n.9 (D.C. Cir. 1967); *Persian Gulf Outward Freight Conference* v. *FMC*, 375 F.2d 335, 341 (D.C. Cir. 1967).

Nor does this Court's decision in *Boag* v. *MacDougall*, No. 80-6845 (Jan. 11, 1982) (Pet. 16), suggest that the Commission's dismissal of petitioner's complaint was improper. In that case, this Court reversed a district court's dismissal of

2. Petitioner's contention (Pet. 19) that the Commission has jurisdiction over his claim also lacks merit. Sections 15, 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 814, 815 and 816, were enacted to regulate commercial relationships among common carriers by water and other agencies of maritime transportation and shippers,[6] and the Commission's role as "public arbiter of competition in the shipping industry," *FMC* v. *Pacific Maritime Association*, 435 U.S. 40, 53 (1978), must be understood in that light. To be sure, "it is quite untenable to suggest that collective-bargaining contracts *never* control, regulate, prevent, or destroy competition" (*ibid.*; emphasis by the Court), and agreements and practices ordinarily subject to the Commission's jurisdiction are not exempt merely because they involve a labor union or a collective bargaining agreement.[7] By the same token,

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a prisoner's pro se complaint where the only ground stated for dismissal was erroneous as a matter of law, and no other sufficient ground for dismissal appeared on the record before the Court. Here, both the Commission and the court of appeals articulated a correct basis for dismissal of the complaint, which was amply supported by the record.

[6] Section 1 of the Shipping Act of 1916, 46 U.S.C. 801, defines persons covered by the Act to include common carriers by water in international and offshore domestic trades and persons who provide terminal services for them. Section 15 requires the Commission to review and approve specific categories of agreements among covered persons before they may be implemented. 46 U.S.C. 814. Sections 16 and 17 prohibit covered persons from engaging in certain types of discriminatory or unreasonable practices. 46 U.S.C. 815 and 816.

[7] But see the Maritime Labor Agreements Act of 1980, Pub. L. No. 96-325, 94 Stat. 1021 *et seq.* (MLAA), which expressly excludes most labor agreements from the operation of Section 15 of the Shipping Act. By virtue of Section 6 of the MLAA, 94 Stat. 1022, however, it does not apply to this case, which was initiated four days before the statute was enacted.

however, collective bargaining agreements of carriers that do not bear on intercarrier competition in a manner that affects shippers do not come within the coverage of the statute. See *id.* at 57. Moreover, the Commission must be particularly careful in asserting jurisdiction when the agreement in question goes to the heart of sensitive labor relations issues within the jurisdiction of the National Labor Relations Board, such as the union security clause at issue here. See *Volkswagenwerk* v. *FMC*, 390 U.S. 261, 278 (1968); cf. *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 172-174 (1962).[8] Accordingly, even assuming that the multiemployer collective bargaining agreements challenged by petitioner had the threshold effects on intercarrier competition necessary to bring them within the scope of Section 15, the Commission properly held them to be within the nonstatutory labor exemption to Section 15

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[8] Petitioner refers to many legal provisions outside the Commission's jurisdiction, *e.g.*, the labor laws, the Civil Rights Act of 1964 (Pet. 3, 11), an international convention (Pet. 13-14), and certain laws relating to ship subsidies, which are administered by the Maritime Administration, a division of the Department of Transportation (see Pub. L. No. 97-31, 95 Stat. 151) (Pet. 11-12, 19-20). The Commission's jurisdiction under the Shipping Act, however, must arise from the language of that statute, rather than from some other obligation that may exist elsewhere in the law. In short, petitioner's claims that the Commission should assert jurisdiction because the union security clauses violate "the public policy of the Shipping Act" (Pet. ii, 17) are misguided. As this Court has held, words such as "public interest" in regulatory statutes are not to be construed in the abstract, but must be restricted to the purpose of the regulatory legislation. *NAACP* v. *FPC*, 425 U.S. 662, 669-671 (1976).

jurisdiction. See *United Stevedoring Corp.* v. *Boston Shipping Association*, 16 F.M.C. 7 (1972).

Finally, absent any allegation of injury to shippers or any other class of persons protected by the Shipping Act, the Commission correctly concluded that the complaint stated no claim under Sections 16 and 17 of the Shipping Act of 1916, 46 U.S.C. 815 and 816.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Federal Maritime Commission

OCTOBER 1982

APPENDIX A

SHIPPING ACT, 1916 (46 U.S.C. 801 *et seq.*)

Section 15, 46 U.S.C. 814

Every common carrier by water, or other person subject to this [Act], shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this [Act], or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; alloting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. * * *

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this [Act], and shall approve all other agreements, modifications, or cancellations * * *

* * * * *

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation * * *.

* * * * *

Section 16, 46 U.S.C. 815

* * * * *

It shall be unlawful for any common carrier by water, or other persons subject to this [Act], either alone or in conjunction with any other person, directly or indirectly—

First. To make or give any undue or unreasonable preference or advantage to any particular person, locality, or description of traffic in any respect whatsoever, or to subject any particular person, locality, or description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever * * *.

* * * * *

Section 17, 46 U.S.C. 816

No common carrier by water in foreign commerce shall demand, charge, or collect any rate, fare, or charge which is unjustly discriminatory between shippers or ports, or unjustly prejudicial to exporters of the United States as compared with their foreign competitors. Whenever the Federal Maritime Commission finds that any such rate, fare, or charge is demanded, charged, or collected it may alter the same to the extent necessary to correct such unjust discrimination

or prejudice and make an order that the carrier shall discontinue demanding, charging, or collecting any such unjustly discriminatory or prejudicial rate, fare, or charge.

Every such carrier and every other person subject to this [Act] shall establish, observe, and enforce just and reasonable regulations and practices relating to or connected with the receiving, handling, storing, or delivering of property. Whenever the Commission finds that any such regulation or practice is unjust or unreasonable it may determine, prescribe, and order enforced a just and reasonable regulation or practice.

APPENDIX B

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

No. 79-2565

ALBERT ALAN KEMPH, JR., PETITIONER-APPELLANT

v.

W. J. ESTELLE, DIRECTOR, TEXAS DEPARTMENT OF CORRECTIONS, RESPONDENT-APPELLEE

Nov. 9, 1979

Appeal from the United States District Court for the Northern District of Texas

Before GOLDBERG, RONEY and TJOFLAT, Circuit Judges.

PER CURIAM:

Appellant, a Texas prisoner, was denied a writ of habeas corpus by the district court. The court granted a certificate of probable cause. After appellant's brief was filed on appeal, respondent-appellee filed a "Motion to Dismiss Appeal." Fed.R.App.P. 27.

Respondent does not attack by the motion any procedural default in the appeal, but rather addresses the merits of appellant's claim. The merits of an appeal are to be presented to the Court by briefs filed in accordance with the provisions of Fed.R.App.P. 28, not by motion under Fed.R.App.P. 27.

"Many motions seek relief of a sort which is ordinarily unopposed or which is granted as of course."

Fed.R.App.P. 27, Notes of Advisory Committee on Appellate Rules. Relief contemplated by the procedure established under Fed.R.App.P. 28, on the other hand, generally requires a decision on the merits, for which the parties are given a full opportunity to address all substantive issues, and to respond to the arguments of their adversaries. Attempts to have the Court dispose of the merits of a case by motion are inappropriate for several reasons.

The Court's procedure for handling emergency and administrative matters which are proper subjects for motion practice is markedly different from the procedure followed in determining the merits of an appeal.

The judicial priorities accorded motions and the hearing of cases on the merits differ. There is no reason why an appellee should be permitted to alter those priorities by the way in which it responds to individual appeals.

An appellant is afforded 14 days to file a reply brief to an appellee's brief, but only seven days to file a response in opposition to a motion. Fed.R.App. P. 27(a), 31(a). There is no reason why appellee should be permitted to shorten appellant's time for response to its arguments by filing a motion addressing the merits rather than by filing a brief.

The Federal Rules of Appellate Procedure have been carefully developed to provide what has been determined to be the best way for the merits of cases to be presented to the Court. There is no reason why respondent should be permitted to subvert those rules.

If expediting the appeal is appropriate, or a particular case lends itself to some treatment different from the regular routine for processing appeals, the rules are flexible enough to meet the needs of the particular case. Nothing appears in the motion before

us to justify a failure of appellee to conform to the rules and the regular practice in this Court.

Motions are generally handled without oral argument and decided by a quorum of the court. Fifth Circuit Internal Operating Procedures Manual § IV.E. (Oct. 1, 1979 rev. ed.). Under the well-known Local Rules and operating procedures of this Court, an appeal cannot be decided without oral argument by less than a unanimous court. Fed.R.App.P. 34(a) now provides that oral argument shall be allowed in all cases unless after examination of briefs and record, a panel of three judges "shall be unanimously of the opinion that oral argument is not needed." The filing of a motion addressed to the merits of an appeal tends to thwart these rules.

Local Rule 20 of this Court does provide for the dismissal of appeals on interlocutory motions if "it shall appear to the Court that the appeal is frivolous and entirely without merit." It appears to this panel, however, that the attorneys general in some states in this Circuit are simply abusing this rule by bringing motions alleging as frivolous that which only lacks merit. The motion in this case is six pages long and cites over a dozen cases. Regardless of the merit of petitioner's appeal, such extended argument reveals that it is probably not frivolous. Frivolity should leap from the mere statement of the issues on appeal. If argument is necessary, the issues can only questionably be called frivolous, within the meaning of rule 20. Indeed, the United States District Court has issued a Certificate of Probable Cause for this appeal under Fed.R.App.P. 22(b), an action which was not opposed by the state below, and which could not have occurred had the district judge regarded the appeal as frivolous.

In any event, the appeal could be dismissed under rule 20 *only* if it were frivolous, and not on the ground that the appeal, though not frivolous, lacked merit. Three judges would be involved in denial of the motion. Fed.R.App.P. 27(c). Three other judges would then be involved after briefing in a decision that the appeal lacked merit. Such duplication of judicial effort is inefficient and wasteful of scarce judicial resources. The imposition of that duplicate effort is a burden on the other litigants before this Court who take their rightful place according to the rules.

Flexibility is needed in court rules to enable the Court to handle properly the great variety of cases that come before it. Flexible rules tend to invite abuse. The cooperation of counsel appearing before this Court in eliminating unnecessary activity and following the spirit and intent of the rules is encouraged.

The motion to dismiss is denied, appellee is directed to file a brief in accordance with the rules, and appellant is accorded the full period for filing a reply brief. Fed.R.App.P. 31(a).

MOTION TO DISMISS DENIED.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-181

ARCHIE PELTZMAN,

Petitioner,

v.

FEDERAL MARITIME COMMISSION,
UNITED STATES OF AMERICA,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

REPLY BRIEF FOR THE PETITIONER

ARCHIE PELTZMAN
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Brooklyn, New York 11214

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IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 81-202

ARCHIE PELTZMAN,
Petitioner,

v.

FEDERAL MARITIME COMMISSION
UNITED STATES OF AMERICA,
Respondents.

On Petition for Writ of Certiorari
to the United States Court of Appeals
For the District of Columbia Circuit

REPLY TO OPPOSITION TO PETITION
FOR WRIT OF CERTIORARI

The order of the United States Court of Appeals for the District of Columbia, and the administrative decision by the Federal Maritime Commission legitimizes an illegal pre-hire bargaining agreement in the subsidized, & unsubsidized maritime industry.

This violates the Shipping Act, Labor, anti-trust laws of the United States, & the first amendment right of freedom of association of the U.S. Constitution, & the Norris-Laguardia Act. *(Pet. 9-12).

1. Respondent argues (Opp 8 n8) that petitioners citation of many legal provisions are outside the Commission's jurisdiction, but neglects to mention, that the sworn complaint in this case of violations of the Shipping Act, & other laws have not been investigated or answered or denied by the 185 parties, including the American Mari-

*See the pre-hire Labor Arbitation cases cited, the hiring hall cases cited in the annotation "Application of A Constitutionally based duty of fair representation to union hiring halls," the United States Civil Rights Commission Report on discriminatory practices by referral unions, 1976 reprinted in A. Smith, "Employment discrimination Law," 844, 1978,Title 6 of the Civil Rights Act of 1964, prohibiting employment discrimination in subsidized shipping companies having contracts with Department of Commerce.

time Association & the Pacific Maritime Association (maritime multiemployer bargaining organizations), the American Radio Association, & the Radio Officers Union (unions representing marine radio operators) several ocean common carriers, including Central Gulf. (Opp 4)

Respondents attempt to narrow the sworn complaint to an issue of union security (Opp 4) and thereby to relieve the Commission of its duty to administer the Shipping Act in the broad expansive manner prescribed by this Courts decisions in Federal Maritime Commission v.Pacific Maritime Association, 435 U.S. 40, 1978, Volkswagenwerk Aktsengesellschaft v. F.M.C.; 390 U.S. 261, 1968, & F.M.C. v. Aktiebologet Svenska Amerika Linen (Swedish Am. Line), 390 U.S. 238, 1971, which are dispositive of the questions as to the jurisdiction of the F.M.C. in the Shipping Act, 1916 as amended regarding filing of agreements before the Commission. (Pet19).

2. Petitioner replies to the lack of conflict argument. (Opp 5) by citing the FMC decision *(Pet 33-34a) wherein the Commission adopted the Administrative Law Judges (ALJ) dismissal of the complaint with two exceptions. As authority for these exceptions the Commission cited

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* ... Notwithstanding the last modifying phrase, this statement could suggest that once a particular agreement is determined to be "labor exempt" from the filing & approval requirments of Sec. 15, the activities contenplated by the agreement are also immune from other sections of the Shipping Act, 1916. This result is inconsistent not only with the BSA decision relied on by the Presiding officer, but with Court decisions indicating that action which is "labor exempt" from the reach of section 15 may nevertheless be subject to section 16 of the Act. See e.g. Pacific Maritime Association v. F.M.C., 543 F2d 395, 410, 411 fn 39 (D.C. Cir 1976) reversed on other grounds sub nom. F.M.C. v. Pacific Maritime Ass'n, 435 U.S. 40 (1978); FMC v. Pacific Maritime Ass'n, 435 U.S., supra, at 68, 74-75, (dissent of Justice Powell). Accordingly, the Commission will not adopt the sentence quoted above from page 16 of the Order...

Federal Maritime Commission v. Pacific Maritime Association (supra), and the BSA decision, (United Stevedoring Corp v. Boston Shipping Association), 16 F.M.C. 7, (1972).

This declaration by the Commission refutes the statement (Opp 9) that the Commission correctly concluded that the complaint stated no claim under Sec. 16 & 17 of the Shipping Act of 1916, 46 USC 815 &816.

2. Petitioner's citation of his first amendment rights under international conventions & treaties, (Pet. 12) (freedom to join, or resign, or abstain from joining a union or association) is brushed off as misguided. (Opp. 8 n8). Respondents ignore the landmark international Human Rights case of Young, James & Webster wherein the United Kingdom admitted violation of the European Economic Convention if its closed shop domestic laws caused their discharge, (Pet. 13).

Petitioner argues that the United States Government under its Constitution has a legal & moral obligation to lead the way in Human Rights decisions since both the *E.E.C. & Organization of American States (OAS) have derived their basic documents on freedom of association, & equal employment protection from the U.S. Constitution & its amendments.

3. Finally petitioner argues that the pre-hire exclusive hiring hall referral agreements is a violation of the anti-trust laws, against public policy, & detrimental to the commerce of the United States.

See Anderson v. Shipowners Association

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* See 30 Am. U.L.R. 155, 1980-81, "The American & European Conventions on Human Rights; Similarities & Differences," Thomas Buergenthal.

See Constitutional Protection and the European Convention on Human Rights- An Irish Joke? 44 The Modern Law Review 149, 1981 - Anne Staines.

of the Pacific Coast, 272 US 359, 1926, reversing & remanding. (Syllabus 2):

> A combination between shipowners by which the owners, & operators surrender themselves completely to the control of the resulting association in respect to the employment of seamen on vessels employed in interstate commerce is within the prohibition of the Anti-trust Acts.

In this case the various maritime unions completely control & have a monopoly with respect to employment of seamen. (Pet. 9-11, 17, 18).

The final outcome of the Anderson case was that after two years a trial was held, & the district court held that changed circumstances in the referral practices of the owners association had reduced the percentage of seamen hired to less than fifty percent, 27 F2d 163, 1928. Therefore the association no longer had a monopoly in the hiring of seamen. The Court of Appeals affirmed saying (Syllabus 1):

Evidence held not to show undue interference with free exercise of rights of contract of employment between sailors & shipowners.

31 F2d 539, (9th Cir) 1929. This Court refused certiorari, 279 U.S. 864, 1929.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Archie Peltzman

Archie Peltzman, pro se

October 15, 1982